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No. 97-49

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

PORTLAND GENERAL ELECTRIC COMPANY,

Petitioner,

v.

COLUMBIA STEEL CASTING CO, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* WITH BRIEF *AMICUS CURIAE* SUPPORTING PETITION FOR CERTIORARI

CHARLES D. GRAY.
GENERAL COUNSEL

JAMES BRADFORD RAMSAY
ASSISTANT GENERAL COUNSEL & COUNSEL OF RECORD

COUNSEL FOR AMICUS CURIAE

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
Post Office Box 684
Washington, D.C. 20044-0684

(202) 898-2200

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) hereby respectfully moves for leave to file the accompanying brief as *amicus curiae*. The written consent of the Petitioner has been obtained and filed with the Clerk of the Court. The Respondent has not consented.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States engaged in the economic and safety regulation of carriers and utilities. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating the retail rates and services of electric, gas and telephone utilities operating within their respective jurisdictions. These officials have the obligation under State law to assure the establishment and maintenance of such services within respective franchised utility service territories as may be required by the public convenience and necessity, and to ensure that such services are provided at rates and conditions which are just, reasonable, and nondiscriminatory for all consumers.

In this case, this Court has been asked to review the relationship of Federal antitrust law and traditional and pervasive State regulatory programs through which public utilities and common carriers provide their essential services to the public. In the decision for which Petitioner seeks the Court's review, the U.S. Court of Appeals for the Ninth Circuit held, *inter alia*, that one of the fundamental aspects of State utility regulation -- the requirement that utilities operate in exclusive franchise territories -- can be properly enjoined under the provisions of the Sherman Act. As such, the decision strikes at the heart of the State regulatory programs administered by the members of the NARUC which are based on the long-established and settled principle that duplication of utility facilities in a given geographic market will result in inefficient and less affordable service to the consuming public. *See*, *General Motors Corp. v. Tracy*, 519 U.S. ___, ___, 136 L.Ed.2d

761, 774 (1997). In the language of this Court's formulation of the State action defense to Federal antitrust liability, the creation and maintenance of franchised utility service territories has been and continues to be "affirmatively expressed" and "actively supervised" regulatory policy in virtually every State in the Nation.

If broadly applied, the Court of Appeals' decision will have serious consequences for the regulatory policies and procedures of each of the NARUC's member commissions. Therefore, we believe that the *amicus* participation of a national organization such as the NARUC, which represents each of these State agencies, is justified.

The NARUC respectfully requests that the accompanying brief be accepted for filing notwithstanding the fact that it is submitted beyond the time period established by the Court's rules. The NARUC files this motion and its brief at this time in light of the *amicus* brief submitted very recently by the Solicitor General on behalf of the United States Government. In its brief, the Government argues for an unnecessarily narrow construction of the State action doctrine that could have the effect of undermining State regulatory commissions' ability to adapt regulatory policies to their responsibility to protect the public interest. As the energy and communications industries continue their ongoing transformation from vertically integrated monopolies to greater competition in the marketplace, we believe that it is important for the NARUC to

describe the critical need for State regulatory commissions to have the flexibility to tailor regulatory tools to the needs of competitive markets while protecting retail customers, free from stricture under the Sherman Act.

Accordingly, the NARUC respectfully requests that the accompanying brief be accepted for filing.

Respectfully submitted,

CHARLES D. GRAY
General Counsel

JAMES BRADFORD RAMSAY*
Assistant General Counsel
(Counsel of Record)

National Association of Regulatory
Utility Commissioners
Suite 603, Old Post Office Pavilion
Post Office Box 684
Washington, D.C. 20044
(202) 898-2200

Counsel for *Amicus Curiae*

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

LEFT UNREVIEWED BY THIS COURT, THE COURT OF APPEALS' DECISION WILL CAUSE UNWARRANTED HARM TO STATE REGULATORY POLICIES AND PROCEDURES 6

I. This Court has protected the flexibility of State practices and procedures for utility regulation 6

II. The Court of Appeals' decision exceeds the role of Federal antitrust courts in reviewing State regulatory policies 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES: **PAGE**

Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983)..... 6

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 87 (1980) .... *passim*

Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).....7-8

FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944)..... 7

General Motors Corp. v. Tracy, 519 U.S. ___, 136 L.Ed.2d 761 (1997).....6-7

Indianapolis Power and Light Co. v. Interstate Commerce Commission, 587 F.2d 1098 (7th Cir. 1982) 2

Parker v. Brown, 317 U.S. 341 (1943) 3

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 7-8

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985).....13-14

United States of America v. Southern Motor Carrier Rate Conference, et al., 467 F.Supp. 471 (N.D. Ga. 1979), *aff.* 672 F.2d 469 (5th Cir. Unit "B" 1982); *aff. en banc,* 702 F.2d 532 (5th Cir. Unit "B" 1983, *rev'd*, 471 U.S. 48 (1985) 2,5,9-11

Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1976) 2

STATUTES:

Section 2 of the Sherman Act, 15 U.S.C. § 2 (1990)..... 2

47 U.S.C. § 410(c)(1994)..... 2

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BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE* SUPPORTING PETITION FOR CERTIORARI

INTEREST OF *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) submits this brief as *amicus curiae* in support of Petitioner due to the substantial harm the decision below could have upon the regulation of public utilities by its member State regulatory commissions. As described in the previous motion, the NARUC is a quasi-governmental nonprofit organization founded in 1889. The Association has no corporate

Pursuant to Rule 37.6, Counsel for NARUC represents that no parties to this case authored this brief, in whole or part. No person or entity, other than *amicus curiae*, made any monetary contribution to its preparation or submission.

parents or subsidiaries. Recognized by the Congress as "the national organization of the State commissions", 47 U.S.C. § 410(c) (1994), the NARUC presents the collective interest of State commissions charged with regulating the rates and conditions of service for the intrastate operations of electric, natural gas and telephone utilities. The NARUC's member commissions are obligated under State law to ensure that the rates charged to retail consumers are just and reasonable. The NARUC's mission is to serve the public interest by seeking to improve the quality and effectiveness of public utility regulation in America. Both Congress and the Federal courts have long recognized that the NARUC is a proper party to represent the collective interest of State regulatory commissions.[1]

In the decision for which Petitioner Portland General Electric Company (PGE) seeks this Court's review, the United States Court of Appeals for the Ninth Circuit held that PGE, an electric utility company regulated by the Oregon Public Utility Commission ("OPUC"- a member commission of the NARUC), violated section 2 of the Sherman Act, 15 U.S.C. §2 (1990) by acquiring and maintaining an exclusive service

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[1] *See, for example, United States of America v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), *aff.* 672 F.2d 469 (5th Cir. Unit "B" 1982); *aff. en banc*, 702 F.2d 532 (5th Cir. Unit "B" 1983, *rev'd*, 471 U.S. 48 (1985). *See also, Indianapolis Power and Light Co. v. Interstate Commerce Commission*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

territory with the approval of the OPUC.[2] By its decision, the Court of Appeals held that PGE's 1972 agreement with another electric distributor, Pacific Power & Light (PP&L) to divide electric service within the City of Portland was not exempt from antitrust liability under the "State action" doctrine established by this Court in its decision in *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny. Specifically, the Court below held that the State action defense was unavailable because the 1972 agreement, as affirmatively and specifically approved by the OPUC, did not constitute "a clearly articulated and affirmatively expressed" regulatory policy of the State of Oregon to establish exclusive service territories for the two companies.

The Court of Appeals' decision in this case is of critical importance to State regulators. By holding that the OPUC's approval of the 1972 agreement, as subsequently affirmed by the State's Supreme Court, was insufficient evidence of the State's regulatory policy, the Court of Appeals has greatly restricted the regulatory flexibility of the State commission. The Court has gone far beyond the State action

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[2] The Court of Appeals issued three separate opinions in this case: the final opinion (Petitioner's Appendix A) is reported at 111 F.3d 1427. The first opinion (App.C) is reported at 60 F.3d 1390. The opinion (App. B) vacating the first opinion is reported at 103 F.3d 1446. The opinion of the District Court (App. E) granting partial summary judgment is reported at 770 F.Supp. 562. Subsequent reference will be made to these decisions, as they appear in Petitioner's Appendix, in this form: App. at __.

tests this Court has applied in the past to other State regulatory policies and practices.

Accordingly, this case raises important issues, which should be addressed by this Court, concerning the manner in which State commissions, legislatures and courts establish and implement their policies for the economic regulation of utilities and common carriers. As the National representative of the State commissions, the NARUC's interest in addressing these State action issues is strong, compelling its participation in this case.[3]

SUMMARY OF ARGUMENT

By its decision, the Court of Appeals has sanctioned the use of Federal antitrust law to scrutinize and reject a regulatory practice basic to utility regulation in virtually every State: the establishment of exclusive franchised service territories in which utilities are legally obligated to provide service to all consumers located within their respective territories. By faulting the manner in which the State of Oregon has established and implemented its service territory policy within the City of Portland, the Court of Appeals has called into question similar practices across the country.

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[3] Consistent with this Court's Rule 37.1, the NARUC will not repeat the discussion and analysis of the State action doctrine contained in the Petition for Writ of Certiorari. The NARUC supports those arguments.

Accordingly, this case raises issues of broad National scope and import that should be reviewed by this Court.

In addition, the Court of Appeals has misconstrued this Court's decisions in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 87 (1980) and *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48 (1985) to assess State policymaking and regulatory practices and procedures far beyond any intrusion this Court, or other Courts of Appeals, have sanctioned. And the issue reaches beyond the question of franchised service territories. Under the Court of Appeals' reasoning, any policy or practice established by a State regulatory commission under general statutory authority, such as the common directive to ensure "just and reasonable" rates, will be at risk, even if the decision of the State commission has been affirmed by the State's highest court as consistent with the intent of the State's legislature. Accordingly, at a time of major upheaval in utility regulation, the Court should review the decision below and establish clarity and consistency in this important area of the law.

ARGUMENT

LEFT UNREVIEWED BY THIS COURT, THE COURT OF APPEALS' DECISION WILL CAUSE UNWARRANTED HARM TO STATE REGULATORY POLICIES AND PROCEDURES

I. This Court has protected the flexibility of State practices and procedures for utility regulation

As this Court has acknowledged, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983). Last term, in analyzing State regulation of the retail distribution of natural gas (but equally applicable to electric utilities), the Court recognized the pervasive role played by the States in regulating utility services: "To this day, all 50 States recognize the need to regulate utilities engaged in local distribution of natural gas." *General Motors Corp. v. Tracy*, 519 U.S. ___, ___, 136 L.Ed.2d 761, 777 (1997). As analyzed there, the regulatory model used by the States to structure natural gas distribution services has been the same model at issue in this electric utility case – "a single, local franchise with a business opportunity free of competition...balanced by regulation and the imposition of obligations to the consuming public...." *Id.* at 775. While both the retail electric and natural gas industries are now in a

transition to greater market competition, the "dual market" analysis described in the *General Motors* decision (i.e. regulated core markets in defined service territories for distribution and competitive energy suppliers serving other non-core markets) remains the basic approach employed by the States. *Id.* at 777, n. 10.

Moreover, the Court has often reaffirmed the constitutional principle that in discharging this important function, the State regulatory commissions have broad authority "to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 316 (1989) (*Duquesne*). In *Duquesne*, the Court observed that State regulation of utilities providing retail service to their customers is a difficult undertaking, requiring the consideration of a multitude of factors: "The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result." *Id.* at 314. Accordingly, this Court has been loathe to restrict the flexibility of regulatory bodies, both State and Federal, to exercise their "economic judgment" on behalf of utility ratepayers. *Id., see also, FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

In *Duquesne*, the Court also described the role that regulatory bodies such as the OPUC perform within State government. "[T]he Pennsylvania PUC is essentially an administrative arm of the legislature." 488 U.S. at 313. Accordingly, like legislative bodies, State commissions "must be free, within the limitations imposed by pertinent constitutional and *statutory commands*, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Id.* at 313-314, citing *Permian Basin*, *supra*, 390 U.S. at 767 (emphasis in original). In short, in its analysis of the constitutional limitations on commission authority, this Court, both historically and quite recently, has sought to protect the flexibility and discretion through which regulatory judgment is exercised by both State and Federal commissioners.

Similarly, this Court's recent antitrust decisions applying the State action doctrine have consistently recognized the need to preserve regulatory flexibility. In applying the two elements of what has come to be known as the *Midcal* test -- that private anticompetitive conduct which is conducted pursuant to an "affirmatively expressed and clearly articulated" State policy which is "actively supervised" by the State is exempt from antitrust liability -- the Court has not attempted to interfere with the traditional tools State commissions have used

to regulate utility rates and services.[4] The Court has not used the *Midcal* formulation to micromanage State utility policymaking, whether at the PUC or legislative level, nor has the effectiveness of State regulation been examined with a Federal microscope to determine how "actively" regulators have discharged their responsibilities.

For example, with respect to the "clear articulation" prong of *Midcal* – the question at issue in this case -- the Court in *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48 (1985) held that a long-standing decision of the Mississippi Public Service Commission allowing trucking companies to collectively file intrastate rate proposals was sufficient to provide State action immunity to private truckers participating in the collective activity. *Id.* at 63-64. The Mississippi commission made this decision pursuant to a generalized "just and reasonable" rate standard, and not specific authorization from the State's legislature. The Court found this expression of State policy sufficient:

> The statute provides that the Commission is to prescribe "just and reasonable" rates for the intrastate transportation of general commodities. The legislature thus made clear its intent that intrastate rates would be determined by a regulatory agency, rather than by the market. The details of the inherently anticompetitive rate-setting process, however, are left to the agency's

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[4] *See, California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 87, 105 (1980).

> discretion. The State Commission has exercised its discretion by actively encouraging collective ratemaking among common carriers. We do not believe that the actions petitioners took pursuant to this regulatory program should be deprived of Parker immunity.
>
> 471 U.S. at 63-64
> (citations omitted)

Even though the Mississippi legislature had enacted no specific legislation with respect to collective ratemaking, the Court attributed to the State as sovereign the decision of its regulatory commission authorizing such activities. *Id.* at 65. (the State of Mississippi, by the decision of its public service commission, "has articulated clearly its intent to displace price competition among common carriers with a regulatory structure.") Importantly, the Court did not parse the wording of the Mississippi PSC's decision, rendered years before, but rather, understood the anticompetitive conduct at issue in the context of the State's overall regulatory policy to substitute economic regulation for unbridled competition.

As in the case of the constitutional limitations on State commission actions, the Court's reasoning in *Southern Motor Carriers* provides ample evidence that in the context of Federal antitrust litigation, the States should not be tightly held to specific "tests" which restrict the regulatory flexibility of their commissions. And the reason why it is important to ensure this result is clear:

> If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate a state policy would diminish, if not destroy, its usefulness.
>
> 471 U.S. at 64

Stated differently, if the *Midcal* formulation's "affirmative expression" standard is construed to require precise compliance by State regulatory commissions with rules made after the fact on a case-by-case basis by the Federal judiciary, agency regulation of utilities and carriers will be difficult, if not impossible.

II. The Court of Appeals' decision exceeds the role of Federal antitrust courts in reviewing State regulatory policies

In contrast to the flexibility this Court has traditionally provided State utility commissions, the Court of Appeals decision afforded little deference to the OPUC's 1972 decision, the OPUC's 1992 reaffirmation of its 1972 decision, and related commission and State court rulings. Rather, the court below found that the OPUC "did not approve the displacement of competition...with the clarity required by

Midcal." A-14. In so doing, the Court found a crucial distinction between the OPUC's decision to approve the utilities' agreement to allocate customers and facilities to specific geographic markets and the OPUC's failure to specifically declare that that allocation involved the establishment of exclusive service territories. *Id*.

We respectfully submit that the Court of Appeals' view of the OPUC decisionmaking process is empty formalism that is inconsistent with this Court's prior application of the State action doctrine to utility regulation. As the petition for certiorari explains, it was the understanding of the parties to the 1972 agreement and the OPUC itself that the State commission's decision approving the agreement was intended by the State to allocate customers so as to eliminate competition between PGE and PP&L. Pet. at 4-7. For the next twenty years, the OPUC regulated the two companies on the basis of this territorial allocation, and in 1992, issued decisions reaffirming its intention and understanding that its original approval of the utilities' agreement allocated retail service in Portland between the two companies. *Id*

The Petition describes how the Court of Appeals analysis of the "clear articulation" prong of the *Midcal* decision is inconsistent with decisions of this court and other Federal circuits. We agree with that analysis. However, from the perspective of the State commissions that must manage

their regulatory policies and procedures as effectively as possible, the NARUC approaches this issue from a practical perspective: on a day-to-day basis, how can State commissions manage their case load, discharge their statutory responsibilities, and protect the public interest from the abuse of market power in retail markets that are not yet fully competitive without not running afoul of Federal antitrust policies.

As this case illustrates, it is plainly disruptive of State regulatory processes for a commission's decisions to be strictly scrutinized by Federal courts decades after the commission acted under legal standards not fully formed when the State commission acted. Here, the OPUC's 1972 decision – affirmed by the Oregon judiciary -- to rationalize utility service territories in a manner consistent with typical regulatory practice at the time has been swept aside on the grounds that it lacks the clarity and precision found by a Federal court in 1996. Indeed, by its rejection of the OPUC's 1992 Order (App. M), the Court of Appeals determined that the OPUC's understanding of its own order was without effect.

We urge the Court to take this case to again define the appropriate role for Federal antitrust courts concerning State utility regulatory proceedings. Just as the Court found that it would be undesirable "to embroil the federal courts in the unnecessary interpretation of state statues" in *Town of Hallie*

v. City of Eau Claire, 471 U.S. 34, 44, n.7 (1985), it should determine here (as it did concerning the State of Mississippi's policy on motor carrier ratemaking) that Federal courts should not be embroiled in the details of State regulatory processes as well.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

CHARLES D. GRAY
General Counsel

JAMES BRADFORD RAMSAY*
Assistant General Counsel
& COUNSEL OF RECORD

National Association of Regulatory
Utility Commissioners

Suite 603, Old Post Office Pavilion
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